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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Petition of Ameritech for Forbearance | ) | CC Docket No. 99-65 |
| from Dominant Carrier Regulation of its | ) | |
| Provision of High Capacity Services in the | ) | |
| Chicago LATA | ) | |



# COMMENTS OF CORECOMM LTD.

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Dated: March 31, 1999

## TABLE OF CONTENTS

## Executive Summary

Ameritech's Petition fails to meet its burden of presenting persuasive evidence that the market conditions in the Chicago Area have changed sufficiently that deregulation would satisfy the objectives of Section 10 of the Communications Act and the public interest. Ameritech's showings are insufficient, because they fail to address the principal issues, instead proving matters that are only at most indirectly related to the criteria set forth in the Act. Deregulation of high capacity services in the Chicago market and its environs would be a significant detriment to existing and potential competitive carriers, because it would allow Ameritech to engage in predatory and anticompetitive tactics. Ameritech's continued market dominance of the facilities needed to engage in high capacity services, and its control of monopoly bottleneck facilities renders its arguments concerning the need for deregulation of such services patently absurd.

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## COMMENTS OF CORECOMM LTD.

CoreComm, Ltd. ("CoreComm"), by its undersigned counsel and pursuant to the Commission's Public Notice, DA 99-334, hereby submits the following comments in response to the above-captioned petition filed by Ameritech, which seeks forbearance from regulation as a dominant carrier in its provision of high capacity special access, dedicated transport for switched access, and interstate intraLATA private line services (together referred to herein as "High Capacity Services") in the Chicago, Illinois local access and transport area ("LATA").

## I. INTRODUCTION

### A. Scope of Ameritech's Request

Ameritech seeks forbearance pursuant to Section 10 of the Communications Act of 1934, as amended (the "Act")[1] from (1) the requirement that it file tariffs for high capacity services;[2] (2)

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[1] 47 U.S.C. § 10.

[2] Ameritech Petition at 24 and 24 n.75, citing *In the Matter of Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CCB/CPD No. 96-3, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-219, 12 FCC Rcd 8596 (rel. June 19, 1997) ("CAP Forbearance Order").

the requirement that it file tariffs with 15 days' notice with accompanying cost support;[3] (3) the requirement that it average its rates within study areas;[4] (4) the price cap regulations;[5] and (5) "any other rules that would currently apply to Ameritech as a dominant provider, but not to other non-dominant providers of high capacity services in the Chicago LATA.[6]

**B. Ameritech Has Failed To Meet its Burden of Proof**

Section 10(a) of the Act states that the Commission must forbear from enforcing a regulatory requirement if several conditions are met, namely, that (i) enforcement of such regulation is not necessary to ensure the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (ii) enforcement of such regulation is not necessary for the protection of consumers; and (iii) forbearance from applying such regulation is consistent with the public interest. As a Petitioner proposing a change from the *status quo ante* under Section 10(b) of the Act, Ameritech must carry the burden of demonstrating that is entitled to the relief it seeks, and this means that it must make a *persuasive* showing that *each* of the criteria set forth in Section 10(a) of the Act is satisfied with respect to *each service* it seeks to deregulate. In addition, the quality of the evidence presented must be more than mere speculation or bald assertions. The

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3 Ameritech Petition at 24 and 24 n.76, citing 47 CFR §§ 61.38, 61.41 – 61.49.

4 Ameritech Petition at 24 and 24 n.77, citing 47 CFR § 69.3(e)(7).

5 Ameritech Petition at 24 and 24 n.78, citing 47 CFR §§ 61.41 – 61.49, 65.1(b)

6 Ameritech Petition at 24.

Commission has held in the past that requests for forbearance must be supported with more than broad, unsubstantiated allegations.[7]

As an initial matter, it must be observed that Ameritech has not even seriously attempted to meet the minimum thresholds for the required showings. For one thing, Ameritech generally attempts to "lump together" the different types of services for which it is seeking regulatory relief as if they are all essentially the same, on the theory that one generalized showing can be made covering all of them. CoreComm submits that this approach is flawed from the outset. As a structural matter, Ameritech must address *each* of the separate services in turn (*viz.,* high capacity special access, dedicated transport for switched access, and interstate intraLATA private line services) and show (with convincing evidence) not only that *all* of the market-specific criteria set forth in Section 10 of the Act are satisfied, but *also* that it is in the public's interest for the Commission to withdraw its oversight of that particular service.

Ameritech's Petition includes limited – and, CoreComm submits, inadequate -- showings for special access services and dedicated transport. Importantly, however, Ameritech does not even attempt to make the requisite showings with respect to the inter- and intrastate private line services for which it seeks regulatory relief. Absent the required showings for private line services, there is no basis whatsoever for consideration of Ameritech's proposal to deregulate them. Accordingly, the Commission should limit its review of the Petition to questions pertaining to special access and dedicated transport.

For purposes of this discussion, however, since most of Ameritech's showings purport to pertain to the indiscriminate basket of High Capacity Services, CoreComm will maintain the fiction of assuming that all of these services can be considered together. In any event, since Ameritech has failed to carry its burden of proof with respect to all of them, this does not alter the recommended outcome.

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7 CAP Forbearance Order, 12 FCC Rcd 8596 at 8607.

## II. DISCUSSION

For the past year, CoreComm (through one of its subsidiaries, CoreComm Newco, Inc.) has been reselling Ameritech local exchange service to residential and business customers in Ohio. CoreComm subsidiaries currently have CLEC certification in Illinois and other states and numerous other applications are pending. CoreComm thus plans in the near future to expand the geographic scope of its operations and also plans to commence the provision of facilities-based service. Corecomm has recently signed a definitive agreement to acquire substantially all of the local exchange telecommunications resale business of USN Communications, Inc., which operates principally in Illinois, Ohio, Michigan, Massachusetts and New York. In addition, CoreComm has also agreed to acquire 100% of the stock of Megsinet, Inc., a fast-growing national Internet network and regional telecommunications provider based in Chicago. Accordingly, Ameritech's activities in the Chicago LATA are of crucial interest to CoreComm and its future plans.

CoreComm strongly opposes Ameritech's request for forbearance from dominant regulation in the provision of High Capacity Services. Ameritech has failed to demonstrate that it meets the requirements of Section 10 of the Act which are necessary to warrant forbearance. Ameritech continues to exercise market power in the provision of High Capacity Services, and therefore, continued dominant carrier regulation of Ameritech's services is critical to the development of competition in this area. If Ameritech were able to provide High Capacity Services on an unregulated basis, it would be able to use its incomparable market power and presence in the Chicago LATA to undercut existing competitors, and discourage market entry by potential competitors. The image Ameritech seeks to convey, of a hapless, powerless entity surrounded by increasingly aggressive competitors is far from the truth.

### A. Ameritech Fails to Meet the Section 10 Forbearance Requirements

To obtain forbearance from rate regulation for its high capacity special access services, Ameritech must essentially demonstrate that there has been a major sea change from decades of

absolute monopoly domination of the telecommunications market in the Chicago area. To justify deregulation of all of Ameritech's High Capacity Services, or any of them, it would be necessary to provide *hard data* that the markets for these services in and around Chicago are entirely different than they have been historically.

To this end, Ameritech must demonstrate that it does not continue to exercise market power in the High Capacity Services market.[8] In addition, to meet the public interest requirement of Section 10 of the Act, Ameritech must show that forbearance from rate regulation for its High Capacity Services will promote competitive market conditions. 47 U.S.C. § 160(b). As explained below, Ameritech not only fails to meet the requirements necessary to warrant forbearance, its Petition fails to provide sufficient data or an explanation for the data provided to support its conclusions. For these reasons, Ameritech's Petition must be denied.

### 1. Ameritech Continues to Exercise Market Power with Respect to High Capacity Services.

If a carrier exercises market power in the provision of its services, rate regulation is necessary to ensure that the rates, terms and conditions for that carrier's services are just and reasonable and are not unreasonably discriminatory.[9] In assessing market power, the Commission looks at several factors including market share, demand and supply elasticity, and a carrier's cost, structure, size and resources. AT&T Non-Dominance Order at 3293. In applying these factors to Ameritech's provision of High Capacity Services, it is clear that Ameritech has not made a persuasive showing that it no longer dominates this market; accordingly, forbearance is not warranted in this case.

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[8] *In Re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995) ("AT&T Non-Dominance Order").

[9] *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd. 3271 (1995).

Ameritech claims that its retail market share of High Capacity Services in the Chicago area is a clear indication that it lacks market power. Competitive providers, Ameritech asserts, have "captured" almost 94% of the retail market for high capacity special access, almost half of the special access high capacity LDC facility market, and a "substantial portion" of the market for high capacity transport services. Ameritech Petition at 4. Not only are these claims unsubstantiated,[10] they say little about the actual situation in the Chicago LATA. The devil is in the details – or, in this case, the details that were *left out* by Ameritech.

Even assuming *arguendo* that the "94% of the retail market" figure is credible – a doubtful proposition (see note 3, below), this leaves open several material questions. For one thing, Ameritech does not sufficiently justify its choice of the retail market for High Capacity Services as the correct barometer for assessing market power. In fact, CoreComm submits that retail market share is precisely the *wrong* measure of Ameritech's power in the Chicago area. For example, despite marginal competitive incursions, Ameritech still retains monopoly control over facilities used to provide High Capacity Services in and around Chicago. It is the control of

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[10] Ameritech's substantiation for the assertion that competitive carriers have "captured" 94% of retail high capacity services is illusory. In its Petition, Ameritech cites to Dr. Aron's report at 19-25 to support the 94% figure. In fact, footnote 53 on page 19 of Dr. Aron's report sets forth her authoritative source for this assertion. The footnote reads "Data provided by Ameritech." (See also Aron Report, page 2, note 1, which is identical.) Thus, the "evidence" cited by Ameritech is circular – Ameritech cites Dr. Aron, and Dr. Aron cites Ameritech. Plainly, this type of "self-substantiation" is no more than a bald assertion -- an insufficient basis on which to grant the requested relief.

these facilities, and not retail market share, that is the most telling indicator of market power, particularly given Ameritech's continuing control over the broader local exchange bottleneck throughout its region.

Even if Ameritech is not presently the leading retailer of High Capacity Services, it may nevertheless be deriving the lion's share of the revenue from many retail transactions. Ameritech itself grudgingly admits that "Ameritech may be the underlying facilities-based provider in *some* of these competitive resale situations..." Ameritech Petition at 14 (emphasis supplied). Of course, the reader is left to guess exactly *how much* of the retail market comprises providers simply reselling Ameritech's own facilities: since no number is specified, it would seem reasonable to conclude that a *large* portion of the retail market counted by Ameritech is supplied on Ameritech's facilities. (If the number were favorable to Ameritech's showing, there is little doubt that it would be set forth prominently.) Ameritech tries to downplay the importance of the fact that its facilities are being used for a large portion of the retail market supposedly "captured" by other carriers, by emphasizing the importance of the retail relationship and the opportunity it provides to bundle other services. Ameritech Petition at 15. But this is hardly convincing.[11]

Not only that, but Ameritech's status as the dominant provider of facilities for High Capacity Services puts it in a unique position to manipulate if dominant carrier regulation were lifted. Ameritech would have access to detailed reseller customer information as a result of its status as the underlying carrier, and could easily use that information in a predatory fashion,

[11] For one thing, one of the most valuable services to be bundled, interLATA long distance service, is presently forbidden to Ameritech in the subject market, because Ameritech has not yet demonstrated that it has satisfied the "Competitive Checklist" requirements of Section 271 of the Communications Act of 1934, as amended.

undercutting competitors in a variety of creative ways. Since the major cost component of resale is the underlying service purchased from Ameritech, it does not require much imagination to see how Ameritech could recapture much of the retail market which it now complains is controlled by resellers. Indeed, if Ameritech is correct in its assertion that demand in the market for High Capacity Services is highly elastic (an assertion which CoreComm disputes, see *infra*), an unrestrained Ameritech could easily increase its retail share dramatically in a relatively short period of time through relatively modest pricing and marketing adjustments.

Ameritech's other assertions about market share, namely, that competitive providers provide "almost half" of the special access high capacity LDC facilities, and a "substantial portion" of the high capacity transport services market, are similarly unconvincing. Table 1 of Dr. Aron's report (page 21) provides some clarification: in the first quarter of 1998, Ameritech controlled 51.5% of the special access LDCs in the Chicago MSA, 52% of the dedicated transport in Chicago City, and 72% of the dedicated transport in Chicago suburbs. Assuming that these figures are accurate, the remaining percentages were shared by all other providers. Ameritech has not even attempted to assert that any one of the competitive providers controls a percentage of the market that is in any way comparable to the commanding share controlled by Ameritech. (It also is a matter of opinion whether 28% of dedicated transport in the Chicago suburbs, divided among all other providers, is a "substantial portion" of the market in comparison to Ameritech's unified 72%.)

As if this argument were not already sufficiently dubious, it is clear from Ameritech's Petition and attachments that these numbers, to the extent that they can be believed, represent market share of "DS1 Equivalents." *Not* DS1s. DS1 "Equivalents." This improbable method of counting market share has the effect of disingenuously skewing the results, more than likely in

favor of the point Ameritech is trying to make. Since a DS3 can convey capacity equivalent to 28 DS1s, a single DS3 is 28 DS1 "Equivalents." Accordingly, if a competitive provider sells (or resells) a single DS3 to a single customer, this is counted 28 times. Ameritech could have 28 separate DS1 customers and be counted as possessing equivalent market share. Since 28 DS1s cost far more than a single DS3, these services cannot be equated meaningfully. (Ameritech's market share computed in dollars of sales of high capacity special access services may well be far higher than its market share in "DS1 Equivalents.") This eccentric method of "counting" is fundamentally flawed, making it essentially impossible for the Commission to draw any meaningful conclusions about Ameritech's functional market share.[12]

Ameritech also attempts to make hay by repeatedly reciting the number of route miles of fiber installed by a given competitive provider: Ameritech points out that AT&T/TCG has 1,000 miles of fiber in the Chicago area, and WorldCom/MFS has 225 miles of fiber in the area. Ameritech Petition at 11-12. Yet Ameritech has not provided any information about *its own* network that would allow the Commission to put these statistics in context. This is probably not entirely accidental. But even if these touted fiber networks were comparable in size to Ameritech's, this still does not bring us ineluctably to the conclusion Ameritech wishes to reach, *viz.*, that competitive providers have significant market share in one or more of the relevant services. The problem is that we have no information concerning what those fiber routes are being used for, or for that matter, if they are being used at all. Although it may be that *some* of these facilities are being used to compete with Ameritech in the provision of high capacity

[12] It must be reiterated that, even in DS1 equivalents (which is presumably the method of counting market share most favorable to Ameritech's position), Ameritech still controls by far the dominant share of *every* class of service it presents. *See* Table 1, page 21 of Dr. Aron's report.

special access services, we simply have no way of knowing the magnitude (if any) of this supposed use. Ameritech would like the Commission to take that logical leap, but the waters do not look inviting. Mere speculation does not form an acceptable basis for regulatory forbearance.

Ameritech also attempts to gain leverage from the fact that two of its competitors, AT&T and MCI/WorldCom, are purportedly companies with larger financial resources than Ameritech, as evidenced by recent multi-billion dollar acquisitions, and can better afford to compete. Aside from the fact that this comparison is misleading because Ameritech has failed to provide the most meaningful comparison – post-merger Ameritech/SBC to AT&T and MCI – it is also completely inapposite to the proposition Ameritech is seeking to prove. The comparative total financial resources of the three companies (whether including SBC's resources or not) says little if anything about the financial resources of each company that are focused *in the Chicago area.* If resources devoted to Chicago *only* were compared, it stands to reason that Ameritech would have a towering financial advantage.[13] And financial advantages are just one small part of the overall picture. For one thing, Ameritech has decades of presence, experience and name-recognition in Chicago. Its influence in the region is very deep and broad, and this cannot be discounted.

Moreover, its continued domination of bottleneck facilities allows a great deal of flexibility and potential for anti-competitive and predatory activity. CoreComm submits that the Commission should not even consider RBOC petitions for regulatory forbearance until it is clear

[13] Not only that, but as demonstrated by Figure 1 on page 14 of Dr. Aron's report, Ameritech's overall financial resources are not too shabby in comparison to either AT&T or MCI/Worldcom, especially considering that the other two carriers have a nationwide, and international, scope that far exceeds Ameritech's.

that all of the Competitive Checklist requirements for Section 271 entry have been satisfied, and there is the semblance of a level playing field in the local telecommunications market as a whole. To allow carriers such as Ameritech to erode regulatory requirements on a piecemeal basis without making meaningful effort towards satisfying the competitive mandates of the Act is contrary to the public interest.

### 2. Ameritech Has Failed to Demonstrate High Demand and Supply Elasticity in the Markets for High Capacity Services in the Chicago Area

#### a. Demand Elasticity

Ameritech seeks to argue that there is significant elasticity of demand in the high capacity special access market, because customers can freely choose to move from one carrier to another if price, or terms and conditions, are not satisfactory. This unfounded assertion, however, blithely overlooks the fact that most, if not all, Ameritech customers receive such services pursuant to long-term, discounted contracts with significant termination penalties. These penalties deter high-volume customers from migrating to competitive carriers, and belie Ameritech's assertion of demand elasticity. Ameritech seeks to explain away this inconsistency by pointing out that the contract termination charges "have never failed to pass muster with the Commission." Ameritech Petition at 18 n.57. But this entirely misses the point. The question is not whether the charges are *illegal*, but whether they, albeit legally, suppress elasticity of demand by hindering migration of Ameritech customers to other providers. Ameritech has not even attempted to answer this question, but it is just as well, because the answer is nevertheless clear.

#### b. Supply Elasticity

Ameritech also fails to provide convincing evidence that the supply of high capacity special access services is in fact highly elastic. Essentially, Ameritech dances all around the

question without providing satisfying data that would clearly demonstrate the substitutability of other carriers' capacity for Ameritech's. For example, Ameritech points out that collocation arrangements are currently operational in Ameritech offices representing 87% of switched access minutes in the city of Chicago and 63% of switched access minutes in the suburbs. Ameritech Petition at 16. From these statistics, Ameritech concludes that "the vast majority of Ameritech's dedicated switched transport business in Chicago is *immediately addressable.*" *Id.* (emphasis supplied). But this again begs the most pertinent question. Even if it is assumed that this business is "addressable," is it *in fact* being addressed? And what does this concept of "addressability" really mean? What steps would actually have to be taken to "address" this business? Would a carrier need to install certain additional equipment? Would a carrier need to persuade an Ameritech customer to "jump ship?" These are all open questions. Theoretically, if an Ameritech customer is *on the same planet* with a given competitive carrier, that customer is "addressable" – it just requires more or less steps to get to him. Accordingly, "addressability" is a nice-sounding term, but is essentially a useless concept for making the kinds of determinations required to assess whether forbearance is warranted in this instance.

Moreover, proof of competitive carrier presence in a central office measured by collocation statistics does not provide any dependable information about what the collocated facilities are capable of addressing. There may be only one collocated carrier in some of these offices, and it would not be possible to conclude that such carrier can offer the services in question. This is very circumstantial evidence, and is not directly related to the point Ameritech is trying to establish. Collocation is just one of the many factors that determine the "addressability" of customers: other important factors are site conditions, structure and equipment costs, and receipt of requisite permits and franchises for buildout. Much of the ability

of competitors to "address" customers also depends on Ameritech's cooperation, and there is little evidence to support that such cooperation is, or will be, reliably forthcoming.

The bottom line is that Ameritech has failed to demonstrate that high demand and supply elasticities exist in the high capacity special access services market and Ameritech's considerable size and resources allows it to continue to exercise power in this market.

### B. The Commission Should Except Digital Subscriber Line Services from this Discussion

Ameritech does not mention digital subscriber line ("DSL") technology in its Petition, and therefore it is not strictly necessary to refute any showing with regard to DSL services. However, out of an excess of caution it should be pointed out that these services have recently been denominated "special access" services, and they do have the high bandwidth required to substitute for some conventional glass fiber applications. The Commission should except DSL services from its consideration of Ameritech's Petition, however, since these services are relatively new, and there has not been a sufficient opportunity to establish whether the market for them will be competitive. To consider deregulation of DSL services before a competitive market develops would be inconsistent with the requirements of Section 10 of the Act.

## III. CONCLUSION

Ameritech has asked and answered many questions in its pursuit of regulatory forbearance in the Chicago market for high capacity special access services – but it has judiciously refrained from providing significant and essential data that would allow the Commission to judge fairly whether or not it meets the preconditions for forbearance set forth in Section 10 of the Act. As a result, even taking the showings in the Petition at face value, the Commission simply does not have the information necessary to grant the Petition. Since it may be presumed that Ameritech has sought in its Petition to make the strongest showing possible, it may also be presumed that the absence of critical supporting data means that the evidence does

not exist. Ameritech has therefore been reduced to erecting argumentative straw men, and knocking them down to great fanfare. As the proponent of a significant change in the regulatory *status quo,* Ameritech must demonstrate convincingly that it is entitled to the relief it seeks, but has utterly failed to do so.

For these reasons, CoreComm urges the Commission to deny Ameritech's request for forbearance from dominant carrier regulation for provision of high capacity special access services.

Respectfully submitted,

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Dated: March 31, 1999

## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 1999, copies of the foregoing COMMENTS OF CORECOMM LTD; CC Docket 99-65, were delivered via Messenger or First-Class mail*, U.S. postage prepaid, to the following person(s):

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